

REFERENCE TITLE: **discrimination; enforcement; damages**

State of Arizona
House of Representatives
Forty-ninth Legislature
First Regular Session
2009

HB 2228

Introduced by
Representative Ableser

AN ACT

**AMENDING SECTIONS 41-1461 AND 41-1481, ARIZONA REVISED STATUTES; RELATING TO
EMPLOYMENT DISCRIMINATION.**

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 41-1461, Arizona Revised Statutes, is amended to
3 read:

4 41-1461. Definitions

5 In this article, unless the context otherwise requires:

6 1. "Covered entity" means an employer, employment agency, labor
7 organization or joint labor-management committee.

8 2. "Disability" means, with respect to an individual, except any
9 impairment caused by current use of illegal drugs, any of the following:

10 (a) A physical or mental impairment that substantially limits one or
11 more of the major life activities of the individual.

12 (b) A record of such a physical or mental impairment.

13 (c) Being regarded as having such a physical or mental impairment.

14 3. "Employee":

15 (a) Means an individual employed by an employer.

16 (b) Does not include an elected public official of this state or any
17 political subdivision of this state, any person chosen by an elected official
18 to be on the elected official's personal staff, an appointee on the
19 policymaking level or an immediate adviser with respect to the exercise of
20 the constitutional or legal powers of the office, unless the person or
21 appointee is subject to the civil service laws of this state or any political
22 subdivision of this state.

23 4. "Employer":

24 (a) Means a person who has fifteen or more employees for each working
25 day in each of twenty or more calendar weeks in the current or preceding
26 calendar year, and any agent of that person, except that to the extent that
27 any person is alleged to have committed any act of sexual harassment,
28 employer means, for purposes of administrative and civil actions regarding
29 those allegations of sexual harassment AND ASSOCIATED PROTECTED ACTIVITY
30 PURSUANT TO SECTION 41-1464, SUBSECTION A, a person who has one or more
31 employees in the current or preceding calendar year.

32 (b) Does not include either:

33 (i) The United States or any department or agency of the United
34 States, a corporation wholly owned by the government of the United States or
35 an Indian tribe.

36 (ii) A bona fide private membership club, other than a labor
37 organization, that is exempt from taxation under section 501(c) of the
38 internal revenue code of 1954.

39 5. "Employment agency" means any person regularly undertaking with or
40 without compensation to procure employees for an employer or to procure for
41 employees opportunities to work for an employer and includes an agent of that
42 person.

43 6. "Labor organization":

44 (a) Means a labor organization and any agent of a labor organization.

1 (b) Includes:

2 (i) Any organization of any kind, any agency or employee
3 representation committee, group, association or plan in which fifteen or more
4 employees participate and that exists for the purpose, in whole or in part,
5 of dealing with employers concerning grievances, labor disputes, wages, rates
6 of pay, hours or other terms or conditions of employment.

7 (ii) Any conference, general committee, joint or system board or joint
8 council that is subordinate to a national or international labor
9 organization.

10 7. "Person" means one or more individuals, governmental agencies,
11 political subdivisions, labor unions, partnerships, associations,
12 corporations, legal representatives, mutual companies, joint-stock companies,
13 trusts, unincorporated organizations, trustees, trustees in bankruptcy or
14 receivers.

15 8. "Qualified individual with a disability" means a person with a
16 disability who, with or without reasonable accommodation, is capable of
17 performing the essential functions of the employment position that the
18 individual holds or desires.

19 9. "Reasonable accommodation" includes:

20 (a) Making existing facilities used by employees readily accessible to
21 and usable by individuals with disabilities.

22 (b) Job restructuring, part-time or modified work schedules,
23 reassignment to a vacant position, acquisition or modification of equipment
24 or devices, appropriate adjustment or modification of examinations, training
25 materials or policies, the provision of qualified readers or interpreters and
26 other similar accommodations for individuals with disabilities.

27 10. "Religion" means all aspects of religious observance and practice,
28 as well as belief. Unlawful practices as prohibited by this article include
29 practices with respect to religion unless an employer demonstrates that the
30 employer is unable to reasonably accommodate to an employee's or prospective
31 employee's religious observance or practice without undue hardship on the
32 conduct of the employer's business.

33 11. "Undue hardship":

34 (a) Means an action requiring significant difficulty or expense when
35 considered in light of the factors set forth in subdivision (b) of this
36 paragraph.

37 (b) When determining whether an accommodation would impose an undue
38 hardship on a covered entity, factors to be considered include:

39 (i) The nature and cost of the accommodations needed under this
40 article.

41 (ii) The overall financial resources of the facility or facilities
42 involved in the provision of the reasonable accommodation, the number of
43 persons employed at the facility, the effect on expenses and resources of the
44 facility and any other impact of the accommodation on the operation of the
45 facility.

1 (iii) The overall financial resources of the covered entity, the
2 overall size of the business of the covered entity with respect to the number
3 of its employees and the number, type and location of its facilities.

4 (iv) The type of operation or operations of the covered entity,
5 including the composition, structure and functions of the workforce of the
6 covered entity.

7 (v) The geographic separateness and the administrative or fiscal
8 relationship of the facility to the covered entity.

9 Sec. 2. Section 41-1481, Arizona Revised Statutes, is amended to read:

10 41-1481. Filing charges; investigation; findings; conciliation;
11 compliance proceedings; civil action; appeals;
12 attorney fees; violation; classification;
13 definitions

14 A. A charge under this section shall be filed within one hundred
15 eighty days after the alleged unlawful employment practice occurred. A
16 charge is deemed filed upon receipt by the division from or on behalf of a
17 person claiming to be aggrieved or, if filed by a member of the division,
18 when executed by such member upon oath or affirmation. A charge is deemed
19 filed by or on behalf of a person claiming to be aggrieved if received from
20 the United States equal employment opportunity commission. A charge shall be
21 in writing upon oath or affirmation and shall contain such information,
22 including the date, place and circumstances of the alleged unlawful
23 employment practice, and be in such form as the division requires. Charges
24 shall not be made public by the division.

25 B. Whenever a charge is filed by or on behalf of a person claiming to
26 be aggrieved or by a member of the division, referred to as the charging
27 party, alleging that an employer, employment agency, labor organization or
28 joint labor-management committee controlling apprenticeship or other training
29 or retraining programs, including on-the-job training programs, has engaged
30 in an unlawful employment practice, the division shall serve notice of and a
31 copy of the charge on such employer, employment agency, labor organization or
32 joint labor-management committee, referred to as the respondent, within ten
33 days and shall make an investigation of the charge. If the division
34 determines after such investigation that there is not reasonable cause to
35 believe that the charge is true, it shall enter an order determining the same
36 and dismissing the charge and shall notify the charging party and the
37 respondent of its action. If the division determines after such
38 investigation that there is reasonable cause to believe that the charge is
39 true, it shall enter an order containing its findings of fact and shall
40 endeavor to eliminate the alleged unlawful employment practice by informal
41 methods of conference, conciliation and persuasion. Any party to such
42 informal proceeding may be represented by counsel. Counsel need not be a
43 member of the state bar if he is licensed to practice law in any other state
44 or territory of the United States. Nothing said or done during and as a part
45 of such informal endeavors may be made public by the division or its officers

1 or employees or used as evidence in a subsequent proceeding without the
 2 written consent of the persons concerned. If a civil action resulting from a
 3 charge is commenced in any federal or state court, evidence collected by or
 4 submitted to the division during the investigation of the charge and the
 5 source of the evidence shall be subject to discovery by the parties to the
 6 civil action. Any person who makes public information in violation of this
 7 subsection is guilty of a class 1 misdemeanor. The division shall make its
 8 determination on reasonable cause as promptly as possible and as far as
 9 practicable not later than sixty days from the filing of the charge. If more
 10 than two years have elapsed after the alleged unlawful employment practice
 11 occurred, and if the charging party has received a notice of right to sue,
 12 the division may cease investigation of a charge without reaching a
 13 determination.

14 C. All conciliation agreements shall provide that the charging party
 15 waives, releases and covenants not to sue the respondent or claim against the
 16 respondent in any forum with respect to the matters which were alleged as
 17 charges filed with the division, subject to performance by the respondent of
 18 the promises and representations contained in the conciliation agreement.
 19 The charging party or the respondent may prepare a conciliation agreement
 20 which the division shall submit to the other party and which, if accepted by
 21 the other party, shall be accepted by the division.

22 D. If within thirty days after the division has made a determination
 23 that reasonable cause exists to believe that the charge is true the division
 24 has not accepted a conciliation agreement to which the charging party and the
 25 respondent are parties, the division may bring a civil action against the
 26 respondent, other than the state, named in the charge. The charging party
 27 shall have the right to intervene in a civil action brought by the division.
 28 If a charge filed with the division pursuant to subsection A of this section
 29 is dismissed by the division or if within ninety days from the filing of such
 30 charge the division has not filed a civil action under this section or has
 31 not entered into a conciliation agreement with the charging party, the
 32 division shall so notify the charging party. Within ninety days after the
 33 giving of such notice a civil action may be brought against the respondent
 34 named in the charge by the charging party or, if such charge was filed by a
 35 member of the division, by any person whom the charge alleges was aggrieved
 36 by the alleged unlawful employment practice. In no event shall any action be
 37 brought pursuant to this article more than ~~one-year~~ TWO YEARS after the
 38 charge to which the action relates has been filed. THE TWO YEAR PERIOD DOES
 39 NOT INCLUDE ANY TIME THAT ELAPSES BETWEEN THE FILING OF ANY COURT PROCEDURE
 40 TO ENFORCE AN ADMINISTRATIVE SUBPOENA AND THE FINAL RESOLUTION OF THAT
 41 ENFORCEMENT ACTION. THE TWO YEAR PERIOD IS NOT JURISDICTIONAL BUT IS A
 42 STATUTE OF LIMITATIONS SUBJECT TO THE PRINCIPLES OF ESTOPPEL, TOLLING AND
 43 WAIVER. Upon application by the complainant and in such circumstances as the
 44 court may deem just, the court may appoint an attorney for such complainant
 45 and may authorize the commencement of the action without the payment of fees,

1 costs or security. Upon timely application, the court may in its discretion
2 permit the division to intervene in civil actions in which the state is not a
3 defendant upon certification that the case is of general public importance.
4 Upon request the court may stay further proceedings for not more than sixty
5 days pending the further efforts of the parties or the division to obtain
6 voluntary compliance.

7 E. Whenever a charge is filed with the division and the division
8 concludes on the basis of a preliminary investigation that prompt judicial
9 action is necessary to carry out the purposes of this article or article 4 of
10 this chapter, the division may bring an action for appropriate temporary or
11 preliminary relief pending final disposition of such charge. Any temporary
12 restraining order or other order granting preliminary or temporary relief
13 shall be issued in accordance with the supreme court rules of civil
14 procedure. The court having jurisdiction over such proceedings shall assign
15 such action for hearing at the earliest practicable date and cause the action
16 to be expedited in every way.

17 F. The court shall assign any action brought under this article for
18 hearing at the earliest practicable date and cause the action to be in every
19 way expedited. If the action has not been scheduled for trial within one
20 hundred twenty days after issue has been joined, the judge may appoint a
21 master pursuant to rule 53 of the supreme court rules of civil procedure.

22 G. If the court finds that the defendant has intentionally engaged in
23 or is intentionally engaging in an unlawful employment practice alleged in
24 the complaint, the court may enjoin the defendant from engaging in such
25 unlawful employment practice and order such affirmative action as may be
26 appropriate. Affirmative action may include, but is not limited to,
27 reinstatement or hiring of employees with or without back pay payable by the
28 employer, employment agency or labor organization responsible for the
29 unlawful employment practice or any other equitable relief as the court deems
30 appropriate. Back pay liability shall not accrue from a date more than two
31 years prior to the filing of the charge with the division. Interim earnings
32 or amounts earnable with reasonable diligence by the person or persons
33 discriminated against shall reduce the back pay otherwise allowable. No
34 order of the court shall require the admission or reinstatement of an
35 individual as a member of a union or the hiring, reinstatement or promotion
36 of an individual as an employee or the payment to him of any back pay if such
37 individual was refused admission, suspended or expelled or was refused
38 employment or advancement or was suspended or discharged for any reason other
39 than discrimination on account of race, color, religion, sex, age, handicap
40 or national origin or a violation of section 41-1464.

41 H. IN AN ACTION BROUGHT BY A COMPLAINING PARTY AGAINST A DEFENDANT WHO
42 ENGAGED IN AN UNLAWFUL EMPLOYMENT PRACTICE THAT IS PROHIBITED BY THIS
43 CHAPTER, THE RECOVERING PARTY MAY RECOVER PUNITIVE OR COMPENSATORY DAMAGES
44 PURSUANT TO SUBSECTIONS I AND J OF THIS SECTION IN ADDITION TO ANY RELIEF
45 PURSUANT TO SUBSECTION G OF THIS SECTION, EXCEPT THAT IN CASES IN WHICH AN

1 UNLAWFUL EMPLOYMENT PRACTICE INVOLVES THE PROVISION OF A REASONABLE
2 ACCOMMODATION UNDER SECTION 41-1463, SUBSECTION F, PARAGRAPH 4, PUNITIVE OR
3 COMPENSATORY DAMAGES SHALL NOT BE AWARDED UNDER THIS SECTION IF THE COVERED
4 ENTITY DEMONSTRATES GOOD FAITH EFFORTS, IN CONSULTATION WITH THE INDIVIDUAL
5 WITH A DISABILITY WHO HAS INFORMED THE COVERED ENTITY THAT ACCOMMODATION IS
6 NEEDED, TO IDENTIFY AND MAKE A REASONABLE ACCOMMODATION THAT WOULD PROVIDE
7 THE INDIVIDUAL WITH AN EQUALLY EFFECTIVE OPPORTUNITY AND WOULD NOT CAUSE
8 UNDUE HARDSHIP ON THE OPERATION OF THE BUSINESS.

9 I. A COMPLAINING PARTY MAY RECOVER PUNITIVE DAMAGES UNDER THIS SECTION
10 AGAINST A DEFENDANT IF BOTH OF THE FOLLOWING APPLY:

11 1. THE COMPLAINING PARTY DEMONSTRATES THAT THE DEFENDANT ENGAGED IN AN
12 UNLAWFUL EMPLOYMENT PRACTICE WITH MALICE OR WITH RECKLESS INDIFFERENCE TO THE
13 STATUTORILY PROTECTED RIGHTS OF AN AGGRIEVED INDIVIDUAL UNDER THIS CHAPTER.

14 2. THE DEFENDANT IS NOT THIS STATE OR AN AGENCY OR POLITICAL
15 SUBDIVISION OF THIS STATE.

16 J. COMPENSATORY DAMAGES AWARDED UNDER THIS SECTION SHALL NOT INCLUDE
17 BACK PAY, INTEREST ON BACK PAY OR ANY OTHER TYPE OF RELIEF AUTHORIZED UNDER
18 SUBSECTION G OF THIS SECTION. THE SUM OF THE AMOUNT OF COMPENSATORY DAMAGES
19 AWARDED UNDER THIS SECTION FOR FUTURE PECUNIARY LOSSES, EMOTIONAL PAIN,
20 SUFFERING, INCONVENIENCE, MENTAL ANGUISH, LOSS OF ENJOYMENT OF LIFE AND OTHER
21 NONPECUNIARY LOSSES AND THE AMOUNT OF PUNITIVE DAMAGES AWARDED UNDER THIS
22 SECTION SHALL NOT EXCEED THE FOLLOWING FOR EACH COMPLAINING PARTY:

23 1. IF A DEFENDANT HAS MORE THAN ONE BUT NOT MORE THAN ONE HUNDRED
24 EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN THE CURRENT OR
25 PRECEDING CALENDAR YEAR, FIFTY THOUSAND DOLLARS.

26 2. IF A DEFENDANT HAS MORE THAN ONE HUNDRED BUT NOT MORE THAN TWO
27 HUNDRED EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN THE CURRENT OR
28 PRECEDING CALENDAR YEAR, ONE HUNDRED THOUSAND DOLLARS.

29 3. IF A DEFENDANT HAS MORE THAN TWO HUNDRED BUT NOT MORE THAN FIVE
30 HUNDRED EMPLOYEES IN EACH OF TWENTY OR MORE CALENDAR WEEKS IN THE CURRENT OR
31 PRECEDING CALENDAR YEAR, TWO HUNDRED THOUSAND DOLLARS.

32 4. IF A DEFENDANT HAS MORE THAN FIVE HUNDRED EMPLOYEES IN EACH OF
33 TWENTY OR MORE CALENDAR WEEKS IN THE CURRENT OR PRECEDING CALENDAR YEAR,
34 THREE HUNDRED THOUSAND DOLLARS.

35 K. IF A COMPLAINING PARTY SEEKS PUNITIVE OR COMPENSATORY DAMAGES UNDER
36 THIS SECTION, BOTH OF THE FOLLOWING APPLY:

37 1. ANY PARTY MAY DEMAND A TRIAL BY JURY.

38 2. THE COURT SHALL NOT INFORM THE JURY OF THE LIMITATIONS PRESCRIBED
39 IN SUBSECTION J OF THIS SECTION.

40 ~~H.~~ L. In any case in which an employer, employment agency or labor
41 organization fails to comply with an order of a court issued in a civil
42 action brought under this section, a party to the action or the division upon
43 the written request of a person aggrieved by such failure may commence
44 proceedings to compel compliance with such order.

1 ~~I.~~ M. Any civil action brought under this section and any proceedings
2 brought under subsection ~~H~~ L of this section are subject to appeal as
3 provided in sections 12-120.21, 12-120.22 and 12-120.24.

4 ~~J.~~ N. In any action or proceeding under this section the court may
5 allow the prevailing party, ~~other than the division, a~~ reasonable ~~attorney's~~
6 ~~fee~~ ATTORNEY FEES as part of the costs.

7 0. FOR THE PURPOSES OF THIS SECTION:

8 1. "COMPLAINING PARTY" MEANS ANY CHARGING PARTY, THE DIVISION, AND, IN
9 INSTANCES WHERE A CHARGE IS FILED BY A MEMBER OF THE DIVISION, ANY PERSON
10 WHOM A CHARGE ALLEGES WAS AGGRIEVED BY AN UNLAWFUL EMPLOYMENT PRACTICE.

11 2. "UNLAWFUL EMPLOYMENT PRACTICE" MEANS ANY UNLAWFUL EMPLOYMENT
12 PRACTICE AND UNLAWFUL PRACTICE THAT IS DESCRIBED IN SECTIONS 41-1463 AND
13 41-1464.